

APPEAL NO. 040621
FILED APRIL 29, 2004

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 12, 2004. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the fifth quarter. The claimant appealed on legal and sufficiency of the evidence grounds. The respondent (carrier) responded, urging affirmance.

DECISION

Reversed and rendered.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The parties stipulated that the relevant qualifying period was from July 26 through October 24, 2003. The claimant asserts entitlement based on the good faith effort provisions of Rule 130.102(d)(2).

It is undisputed that during the qualifying period the claimant was enrolled in a full-time vocational program sponsored by the Texas Rehabilitation Commission (TRC). At issue was the satisfactory participation provision in Rule 130.102(d)(2). In evidence was an Individualized Plan for Employment (IPE), which indicates that services would be provided for the period of October 6, 2003, through October 6, 2004, and an amendment dated October 22, 2003. The amended goal was for the claimant to attend college courses to become a medical practitioner. Also in evidence were two letters from the claimant's TRC counselor dated February 6 and February 10, 2004. Both letters indicate that the claimant entered into the IPE on October 6, 2003, and that she is currently complying with the terms of her IPE by attending school. The second letter goes on to state that the claimant has been compliant throughout the course of her TRC program. The claimant testified that although she signed the IPE on October 6, 2003, the next semester of classes did not begin until January 2004.

In determining that the claimant is not entitled to SIBs for the fifth quarter, the hearing officer found that the claimant was not satisfactorily participating in the TRC program. In her Statement of the Evidence, the hearing officer stated that the letters from the TRC did not explain how the claimant was satisfactorily participating in the program. She further stated that the "carrier rebutted the TRC letter," and that "[s]imply having a TRC employee recite that there is 'compliance' does not make it true when the claimant's own testimony indicates otherwise."

The question of whether the claimant satisfactorily participated in the full-time TRC program presents a question of fact for the hearing officer to resolve. However, reference to the preamble is instructive on how the issue of satisfactory participation is

to be resolved. In response to a comment that the phrase “satisfactorily participated in” should be defined, the Commission noted that the TRC uses a variety of retraining programs; that each of the programs could have different durations and methods to evaluate satisfactory participation; and concluded that based on those differences, it would be difficult to define the phrase in a way that would apply to each situation. The response explained:

If the injured employee wishes to show that this provision applies, the injured employee can secure information from his or her counselor with the [TRC] to supply to the carrier. If the insurance carrier believes the information provided is not sufficient to meet the requirement of this provision, the insurance carrier can dispute entitlement. The decision of whether or not the injured employee has satisfactorily participated in a TRC sponsored program will be made by the finder of fact during the dispute resolution process.

Based upon this language, it appears that the Commissioners envisioned that the evidence of satisfactory participation presented by the claimant would come from the TRC. In this case, the February 6 and February 10, 2004, letters are such evidence. Although the response quoted above states that the hearing officer, the fact finder, is to resolve the issue of satisfactory participation, the response also appears to envision that where there is evidence from the TRC of satisfactory participation, the carrier has the responsibility to come forward with evidence demonstrating that the claimant is not satisfactorily participating in the program. That is, there should be some affirmative showing that the claimant is not meeting the requirements of the vocational rehabilitation program established for her by the TRC, where, as here, the evidence from the TRC indicates satisfactory participation. See Texas Workers’ Compensation Commission Appeal No. 032949, decided December 15, 2003; Texas Workers’ Compensation Commission Appeal No. 010483-s decided April 20, 2001.

We have held that a claimant’s failure to actually start attending classes during the relevant qualifying period does not per se indicate noncompliance. See Texas Workers’ Compensation Commission Appeal No. 032961, decided December 31, 2003; Texas Workers’ Compensation Commission Appeal No. 023229, decided February 4, 2003, and the cases cited therein. There is no evidence that shows that the TRC was unaware of the fact that the claimant would not start attending classes until the next semester began in January 2004. There is no evidence that the claimant failed to obtain counseling and guidance from the TRC as agreed to in the IPE. There is no evidence that the claimant failed to maintain contact with her TRC counselor at least every 90 days. We note that the carrier was given an opportunity to request a continuance in order to respond to the letters from the claimant’s TRC counselor, but declined to do so. In the absence of such evidence, the hearing officer’s determination that the claimant did not satisfactorily participate in a vocational rehabilitation program during the qualifying period for the fifth quarter is so against the great weight of the evidence as to be clearly wrong or manifestly unjust. Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). Accordingly, we reverse the hearing officer’s determination that the

claimant did not satisfy the good faith requirement under Rule 130.102(d)(2) and render a new decision that the claimant did prove that she had made the required good faith effort in the qualifying period for the fifth quarter by satisfactorily participating in a full-time vocational rehabilitation program sponsored by the TRC and that the claimant is entitled to SIBs for the fifth quarter.

The true corporate name of the insurance carrier is **TEXAS MUTUAL INSURANCE COMPANY** and the name and address of its registered agent for service of process is

**RUSSELL RAY OLIVER, PRESIDENT
221 WEST 6TH STREET
AUSTIN, TEXAS 78701.**

Daniel R. Barry
Appeals Judge

CONCUR:

Robert W. Potts
Appeals Judge

Margaret L. Turner
Appeals Judge